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IN THE

Supreme Court of the United States

October Term, 1982

OREGON PHYSICIANS' SERVICE,
an Oregon nonprofit corporation; and
PHYSICIANS' ASSOCIATION OF
CLACKAMAS COUNTY,
an Oregon nonprofit corporation,
Petitioners,
v.
JOHN HAHN, WADE LIGGETT, JOSEPH AIZAWA,
V.G. LIVINGSTON and D. HUGH FRASER,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions posed by petitioners in their Petition for Certiorari have previously been disposed of by this Court and are more accurately reformulated as follows:

1. Before dismissing an action under the Sherman Act for lack of subject matter jurisdiction due to insufficient effect on interstate commerce, should not the district court permit the plaintiffs to show that those activities of defendant which are infected by the anticompetitive conduct will, as a matter of practical economics, have a not insubstantial effect on interstate commerce?

2. Does the exemption from antitrust scrutiny provided by the McCarran-Ferguson Act to health care insurers for the "business of insurance" extend to discriminatory reimbursement of licensed third-party providers simply because such practices are referenced in the insurance contract?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiff podiatrists filed suit in 1978, alleging that the defendant health care insurers combined in restraint of trade to boycott podiatrists, reimbursing them at rates substantially below those accorded to defendants' physician members. Defendants Oregon Physicians' Service (O.P.S.), and Physicians' Association of Clackamas County (P.A.C.C.), the only defendants continuing to have an interest in the outcome of this petition, Petition at iii, are physician-controlled affiliates of the national Blue Shield organization. The district court, Solomon, J., granted the defendants' Motion for Summary Judgment on February 27, 1981. *Hahn v. Oregon Physicians Service*, 508 F. Supp. 970 (D. Or. 1981).

The District Court Opinion

The district court determined that defendants were immune from the Sherman Act, 15 U.S.C.A. § 1 *et seq.*, (1976), because of the exemption under the McCarran-Ferguson Act,

15 U.S.C.A. § 1011 *et seq.*, (1976), for the "business of insurance." It recognized that its decision on this issue was controlled by *Group Life & Health Insurance Co. v. Royal Drug*, 440 U.S. 205 (1979) ("*Royal Drug*") and *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (5th Cir. 1980) ("*Virginia Academy*"). Relying, however, on the fact that the discriminatory reimbursement practices were incorporated into defendants' insurance policies and that podiatrists are not licensed in Oregon to perform all procedures on the human foot which a physician may perform, the district court held that defendants' discriminatory reimbursement practices were part of the "business of insurance." *Hahn v. Oregon Physicians Service*, at 973-74.

The second relevant aspect of the district court's decision was that plaintiff podiatrists failed to satisfy the "effect on commerce" test for antitrust jurisdiction under the Sherman Act. As the district court notes, defendant O.P.S. never disputed that it had sufficient effect on interstate commerce to support federal antitrust jurisdiction. *Id.* at 976, n.8. The district court was bound under Fed. R. Civ. P. 56(c) to deny defendant P.A.C.C.'s motion for summary judgment on this issue unless defendant P.A.C.C. established that there was no genuine issue of material fact as to the effect of its conduct on interstate commerce. In granting defendant P.A.C.C.'s motion, the district court disregarded defendant P.A.C.C.'s substantial activities in interstate commerce. Instead, it chose to base its decision on a comparison of the dollar amount of supplies purchased by each plaintiff in interstate commerce with the gross income of a few of the more profitable plaintiffs. *Id.* at 977. The justification of this comparison was not disclosed by the trial court, nor was any case authority for such a test cited.

The Ninth Circuit Decision

In answering what it described as the "pivotal question" in this case, the Ninth Circuit panel held that the defendants' discriminatory reimbursement practices did not constitute the "business of insurance", despite their incorporation into

the defendants' insurance contracts. The Ninth Circuit, correctly applying the standards of Fed. R. Civ. P. § 56(c) on the "business of insurance" question, noted both that defendants had failed to establish there were "any *bona fide* risk-related reasons for an insurer to distinguish between the services of M.D.'s and podiatrists" and, that as a matter of law, making such a distinction in reimbursement practices is not within the "business of insurance." *Hahn v. Oregon Physicians' Service*, 689 F.2d 840, 843 (9th Cir. 1982) ("*Hahn*").

In holding that defendants' practices were not the "business of insurance", the court invoked the three-part analysis announced by the Court in *Royal Drug*, at 211-12, 215, 231, and *Union Labor Life Insurance Co. v. Pireno*, ____ U.S. ____, 102 S. Ct. 3002, 3008 (1982). The Ninth Circuit determined that the defendants' discriminatory reimbursement practices (1) failed to transfer risk, (2) did not constitute an integral part of the policy relationship between insurer and insured, and (3) had its primary impact on podiatrists, entities outside the insurance industry. *Hahn* at 843-44.

In reviewing the district court's determination that the plaintiffs had failed to meet the interstate commerce jurisdictional requirement of the Sherman Act, the Ninth Circuit held that the district court had misapplied *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980) ("*McLain*"). First, it noted that the district court failed to identify the relevant aspect of interstate commerce which could have been affected by the alleged antitrust violations. More importantly, it noted that the district court focused its inquiry exclusively on the nature and extent of *plaintiffs'* interstate contacts, failing to consider the degree to which *defendants'* activities might affect interstate commerce. The district court had ignored defendants' (1) commerce in medical insurance from out-of-state sources, (2) commerce in purchases of medical supplies from out-of-state suppliers, and (3) commerce arising out of the interstate movement of patients. Consequently, the Ninth Circuit remanded to the district court for a more complete inquiry into whether the interstate commerce jurisdictional test had been met. *Hahn* at 844.

Defendants' Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Ninth Circuit on January 28, 1983. *Id.* at 840.

REASONS FOR DENYING THE WRIT

I.

Petitioners Fail to Present Sufficient Basis for Granting the Writ

The considerations governing review on certiorari are set forth in Supreme Court Rule 17.1. There it is noted that review on writ of certiorari is not a matter of right, but is subject to judicial discretion, "and will be granted only when there are special and important reasons therefor." The sole basis relied upon by the defendants in seeking review on the interstate commerce issue is set forth in Rule 17.1(a), that the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decisions of other federal courts of appeals, the "conflict between the circuits" principle. The sole basis relied upon by the defendants in seeking review on the "business of insurance" issue is set forth in Rule 17.1(c), that the *Hahn* panel decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

The Ninth Circuit's decision in *Hahn*, regarding the "effect of commerce" test for jurisdiction under the Sherman Act, is in conflict neither with the Supreme Court's decision in *McLain* nor the federal courts of appeals' decisions in *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1981) (en banc) ("*Crane*") or *Cordova & Simonpietri Insurance v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981) ("*Cordova*"). While it is arguable that another decision of the Ninth Circuit might subtly differ from *McLain*, *Crane*, and *Cordova*, *see Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980), ("*Western Waste*"), that case is not before this Court. As *Western Waste* was not relied upon by the Ninth Circuit panel in *Hahn*, *Hahn* does not present an instance of conflict between the Ninth Circuit and either the First or Tenth Circuits, as petitioners suggest.

With regard to that part of the decision in *Hahn* that defendants' challenged activities do not constitute the "business of insurance", defendants fail to point to any question of federal law which has not been settled by the Supreme Court, as required by Rule 17.1(c). Instead, they assert that the Ninth Circuit's decision in *Hahn* is inconsistent with a different Ninth Circuit panel's decision, *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir. 1983). While it is arguable that such a conflict does not, in fact, exist, an *intracircuit* dispute is not sufficient basis for grant of a writ of certiorari under Supreme Court Rule 17. When the Eighth Circuit Court of Appeals certified a question to this Court only a year and a half after another panel for that circuit had addressed the identical question, this Court said:

> Whatever procedure a Court of Appeals follows to resolve these problems — and desirable judicial administration commands consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals — doubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties. [Cites omitted.]

Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) at 902.[1]

This case does not present an example of conflict between the circuits on the interstate commerce issue and there is no basis whatsoever for granting a writ of certiorari to review the *Hahn* panel's decision that defendants' challenged activities do not constitute the "business of insurance" under the McCarran-Ferguson Act. Consequently, the Petition should be denied.

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1. It should be noted that the *Hahn* decision's claimed conflict with the *Klamath Lake* decision was raised by defendants in their motion for reconsideration to the Ninth Circuit, which motion was denied.

II.

The Ninth Circuit Properly Identified the Interstate Commerce Jurisdictional Requirements Under the Sherman Act in Remanding To the District Court

Upon examining the defendants' Petition for a Writ of Certiorari, it is evident that they have actually taken issue with the interstate commerce jurisdictional requirements adopted by the Ninth Circuit in a prior decision, *Western Waste*. Regardless of whether *Western Waste* is or is not in conflict with the decisions in *Crane* and *Cordova*,[2] *Hahn* is

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2. The conflict between the circuits alleged by defendants arises from the Court's statement in *McLain* that, "Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." *Id.* at 242-43. *See Crane*, at 721-23 and *Cordova*, at 44-45. The Court in *McLain* was quite obviously excusing petitioners there from demonstrating that there had, in fact, been an effect on interstate commerce due to the alleged price-fixing scheme of the defendant real estate brokers. Any ambiguity which the quoted language created was resolved by the Court's citation at page 243 to *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940). As the Court said in *United States v. Socony-Vacuum Oil Co.*, "it is the 'contract, combination * * * or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *Id.* at 224, n. 59.

A careful examination of *Hahn*, *Western Waste*, *Crane*, and *Cordova* leads to the conclusion that the conflict between the circuits asserted by defendants is a chimera. The First Circuit in *Cordova never mentions Western Waste* or the existence of a conflict between the circuits. Neither does the Tenth Circuit in *Crane* recognize a conflict between the circuits. Rather, in rejecting plaintiff Crane's position that *McLain* relaxed the jurisdictional requirement of the Sherman Act to include the effect on interstate commerce of defendants' "general or overall business," the court in *Crane* merely noted that ambiguous language in *Western Waste* "arguably supports this contention. . . ." *Crane* at 721. In fact, the Tenth Circuit in *Crane* looked to many of the same aspects of interstate commerce that are affected by the defendants' conduct in *Hahn*: "(1) commerce in medical insurance from out-of-state sources, (2) commerce in purchases of medical supplies from out-of-state suppliers, and (3) commerce arising

entirely consistent both with the decision of this Court in *McLain*, as well as with the Tenth Circuit in *Crane*, and the First Circuit in *Cordova*.

The Supreme Court in *McLain* noted that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" tests. *McLain*, at 242. The Court stated that "jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified. . . ." *Id.* It went on to require that a plaintiff must also allege "the critical relationship" between the defendants' challenged activity and "an effect on some other appreciable activity demonstrably in interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.*, [419 U.S. 186 (1974)] at 202." *Id.*

The jurisdictional requirement for showing an effect on interstate commerce is further clarified by the Court in *McLain* when it says:

> To establish federal jurisdiction in this case there remains only the requirement that *respondents' activities which allegedly have been infected by a price-fixing conspiracy* be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved. *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. at 745; *see Goldfarb v. Virginia State Bar, supra*, at 784, n. 11; *Burke v. Ford*, U.S. 320, 321-322 (1967).

Id. at 246 (emphasis supplied).

Footnote 2 (con't)

out of the interstate movement of patients." *Crane* at 725. Further, in directing the district court to reevaluate plaintiff's assertion of federal jurisdiction under the Sherman Act in *Crane*, the Tenth Circuit cites *Western Waste* for the proper test for such jurisdiction. *Id.*

The Ninth Circuit in *Western Waste* did *not* look to the defendant's "general or overall business" to find jurisdiction under the Sherman Act. Instead, since plaintiff *Western Waste* alleged defendant *Universal Waste* had engaged in predatory pricing in the rubbish collection business, the court confined its inquiry to (1) whether defendant Universal Waste's rubbish collection business had a substantial impact on interstate commerce, and (2) whether the alleged antitrust violations would *directly* affect interstate commerce. *Western Waste* at 1097-98.

It is evident that the "critical relationship" between defendants' allegedly unlawful acts and the effect on interstate commerce required by the Court in *McLain* requires a two-part analysis (1) identifying a relevant aspect of defendants' activities in interstate commerce, *i.e.*, one which the alleged anti-competitive conduct could be expected to inhibit or promote and (2) showing that "as a matter of practical economics" *this infected aspect*, not necessarily the unlawful activities themselves, would logically have a not insubstantial effect on the interstate commerce involved. This interpretation is reinforced when the following statement by the Court in *McLain* is recalled:

> Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce. Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce.

Id. See Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 743-44 (1976).

The analysis of *McLain* above has been concisely summarized by the Ninth Circuit in *Palmer v. Roosevelt Lake Log Owners Association, Inc.*, 651 F.2d 1289 (9th Cir. 1981) ("*Palmer*"). It is the *only* Ninth Circuit decision relied upon by the Ninth Circuit panel in *Hahn*. In *Palmer*, plaintiffs alleged that defendant Roosevelt Lake Log Owners' Association sought to restrain trade in the gathering and sale of abandoned logs on Roosevelt Lake by threatening the plaintiffs not to gather or sell abandoned logs on Roosevelt Lake and warning lumber mills not to purchase logs from the plaintiffs. The court in *Palmer* summarized the jurisdictional test in *McLain* as follows:

> The Court then set forth a two-part analysis for determining if the commerce requirement was satisfied.

> First, a relevant aspect of interstate commerce must be identified. Second, the defendants' activities must be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved."

Id. at 1291. In applying this test, it is clear that the Ninth Circuit in *Palmer* identified only that aspect of defendants' interstate commerce which would logically be inhibited by the allegedly unlawful conduct: "[W]e identify the relevant aspect of interstate commerce as the sale of Washington lumber and lumber products for use outside the state." *Id.* at 1291-92. After identifying the relevant aspect of defendant's interstate commerce, the court in *Palmer* applied the second part of the *McLain* test. It determined that the foreseeable result of defendants' monopoly on log gathering would be to reduce the number of suppliers of logs, and "[s]uch a restriction on the number of suppliers could, as a matter of practical economics, ultimately be expected to affect the price or volume of sales of Washington lumber and lumber products out-of-state [citations omitted]." *Id.* at 1292.

Contrary to the suggestion by the defendants in their petition, *Western Waste Service Systems v. Universal Waste Control* was never cited in the *Hahn* opinion. Thus, it is the interpretation of *McLain* which appears in *Palmer*, rather than in *Western Waste*, which guided the court in *Hahn*. In fact, the excerpt from *Palmer* quoted above was also quoted by the Ninth Circuit in *Hahn*, 689 F.2d at 844. Following this two-part analysis, the court in *Hahn* held that the district court, Solomon, J., had misapplied the *McLain* analysis. *Id.*

In the instructions to the district court on remand, it is clear that the two-part analysis suggested in *Palmer* and *McLain* is to serve as the test in determining whether federal jurisdiction under the Sherman Act exists. The district court is instructed to first identify a relevant aspect of defendants' interstate commerce. *Hahn* at 844. Next, it is to determine whether "defendants' relevant insurance activities," as opposed to defendants' general activities in interstate commerce, have, as a matter of practical economics, a not insubstantial effect on interstate commerce. The effect of

defendants' conduct on the interstate commerce of plaintiffs is to be considered only part of the overall effect. *Id.*

The "overbroad construction" of the *McLain* opinion which defendants fear and for which they petition for a writ of certiorari is obviously not the test applied by the court in *Hahn*. In remanding to the district court, the court in *Hahn* has directed the district court to limit its determination of jurisdiction to defendants' relevant insurance activities in interstate commerce. For that reason, the Ninth Circuit is neither in conflict with the Supreme Court in *McLain* nor the Tenth Circuit in *Crane* and the First Circuit in *Cordova*. Review of the Ninth Circuit's decision on the interstate commerce jurisdictional issue is, therefore, unnecessary.

III.

The Ninth Circuit Correctly Determined That Defendants' Discriminatory Reimbursement Practices Are Not the "Business of Insurance"

Defendants assert that the Ninth Circuit panel in *Hahn* erred in holding that defendants' discriminatory reimbursement practices were not within the "business of insurance", as required for an exemption from the antitrust laws by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*[3] The panel relied primarily on the U.S. Supreme Court decisions in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Insurance Co. v. Pireno*, ____ U.S. ____, 102 S. Ct. 3002 (1982) ("*Pireno*"). Drawing from both decisions, the *Hahn* court adopted the three-part analysis utilized by each to determine whether particular practices are, in fact, the business of insurance:

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3. To come within the exemption from federal antitrust law under the McCarran-Ferguson Act, the challenged conduct must be (1) regulated by state law, (2) the "business of insurance", and (3) not a boycott. 15 U.S.C.A. §§ 1012(a), 1013 (1976). *See Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 642 F.2d 476, 483 (4th Cir. 1980). *See also St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539-40 (1978).

> The Court identified three relevant criteria for determining if a business practice is part of the "business of insurance: " "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry". *Union Labor Life Insurance Co. v. Pireno*, ____ U.S. ____, ____, 102 S. Ct. 3002, 3008, 78 L. Ed. 2d 647 (1982). *See also Royal Drug*, 410 U.S. at 211-12, 215, 231, 99 S. Ct. at 1073, 1075, 1083.

Hahn at 842. In applying this analysis, the court first addressed whether defendants' practices transfer or spread a policyholder's risk. It held that defendants "introduced no evidence that there are any *bona fide* risk-related reasons for an insured to distinguish between the services of M.D.'s and podiatrists, much less that such a distinction is at the core of what is commonly understood to be the 'business of Insurance'". *Id.* at 843.

Next, the court in *Hahn* addressed whether defendants' practices are "an integral part of the policy relationship" and whether they are "limited to entities within the insurance industry". Holding that neither was the case, the court said, "arrangements whose primary impact is on competition in markets other than that for insurance do not fall within the exemption. Since this is the case here, the appellees cannot claim the benefit of the McCarran-Ferguson exemption". *Id.* at 844.

Thus, the *Hahn* court's determination that defendants' practices do not come within the "business of insurance" rests squarely on the Supreme Court's decisions in *Royal Drug* and *Pireno*. Both cases justify the *Hahn* court's position that where an insurer's anticompetitive practices do not spread risk among the insureds and where third party providers or suppliers are those primarily affected by the anticompetitive practices, those practices will not be deemed the "business of insurance". In their petition, defendants state that the *Hahn* panel "miscontrues" *Royal Drug* and *Pireno*, Petition at 16, but do not elaborate further on the *Hahn* panel's asserted departure from *Royal Drug* and *Pireno*.

The defendants declare that the panel has misread the record. Petition at 16. Again, they do not share their views on the specifics of this asserted misreading. Instead, defendants merely quote from a footnote in *Hahn* that "[p]repaid health care provider plans are difficult to analyze. . . ." *Hahn* at 843, n.2. Defendants delete the remainder of this footnote which warns that, "[c]ourts should be careful not to allow insurance companies to broaden the antitrust exemption by simply diversifying into areas not traditionally considered to be the business of insurance". *Id.*

Defendants next argue that the Oregon Legislature has established a distinction between services provided by medical doctors and services provided by podiatrists. They do not intimate the significance of this distinction. Oregon statutes recognize the podiatrist as an independent professional entity, licensed to diagnose and provide medical, physical, or surgical treatment of ailments of the human foot, an area of practice which, barring limited exceptions, is shared with medical doctors. O.R.S. 682.010, quoted in Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix J at 98. The challenged conduct consists of those discriminatory practices of defendants which relate to covered foot care services that are identical to those provided by competing physician members of defendants who determine defendants' reimbursement practices.

In an analytically similar case, *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), clinical psychologists challenged a requirement by Blue Shield of Virginia that all therapy be billed through a physician before reimbursement would be allowed. The disparity in the scope of licensure for the two professionals did not qualify such a discriminatory practice as the "business of insurance", entitled to antitrust immunity under the McCarran-Ferguson Act. The court found that psychologists and psychiatrists do compete, regardless of certain limitations on the psychologists' practice and, therefore, the distinction urged by Blue Shield of Virginia in *Virginia Academy* was deemed not to excuse their anticompetitive conduct. *Id.* at 484-85.

Defendants assert that the *Hahn* panel misconstrues the *Virginia Academy* decision because in that case the Virginia State Legislature had adopted legislation mandating equal provider status and equality of reimbursement between psychologists and psychiatrists. Consequently, defendants' practices in that case were in violation of state law. While the defendants' practices were undoubtedly in violation of state law,[4] there is no suggestion whatever by the *Virginia Academy* court that this was the basis of its decision that the bill-through provision was not the "business of insurance". Instead, after analyzing the Supreme Court decision in *Royal Drug*, the court in *Virginia Academy* held:

> The essence of the business of insurance is the relationship between the insurance company and its policyholder. *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969); *Bartholomew v. Virginia Chiropractors Ass'n*, 612 F.2d 812 (4th Cir. 1979), *cert. denied*, ____ U.S. ____, 100 S. Ct. 2158, 64 L. Ed. 2d 791 (1980). We are persuaded that the defendants' policy regarding payment of clinical psychologists is only tangential to that relationship in that it does not affect the benefit conferred upon the subscriber.

Id. at 483.

Defendants further attempt to distinguish *Virginia Academy* because the "bill-through" practice had no bearing on distribution of risk under the policy. Petition at 18. This distinction disappears when it is recalled that the *Hahn* court noted that the defendants "have introduced no evidence tending to establish that there are any underlying *bona fide* risk-related reasons for an insurer to distinguish between the

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4. Blue Shield of Virginia's health care insurance policy was revised in 1972 to allow payment to psychologists only when the services were billed through a physician. The Virginia statute mandating direct payment by Blue Shield for services rendered by licensed psychologists was not passed until 1973. Va. Code § 38.1-824. *Virginia Academy* at 783. Thus, defendants' practice was legal under state law between 1972 and 1973. Without any reference to a violation of state law, the Fourth Circuit held that Blue Shield of Virginia's "bill-through" provision was not the "business of insurance" under *Royal Drug*, "because the subscribers received the same benefit. . . ." *Id.* at 484.

services of M.D.'s and podiatrists, much less that such a distinction is at the core of what is commonly understood to be the 'business of insurance.'" *Hahn* at 843. Thus, contrary to the assertion of defendants, *Virginia Academy* offers a compelling analogy to the decision in the instant matter.

In a rather perplexing segue, defendants assert that the *Hahn* panel fails to distinguish among the various "petitioner-appellee-defendants" whose practices, defendants assert, vary widely. Petition at 16-17. They assert that O.P.S. and P.A.C.C., the only remaining defendants having a real interest in the outcome of this litigation, do not engage in two of the unlawful practices. *Id.* The evidence is equally uncontradicted, however, that O.P.S. and P.A.C.C. engage in the following unlawful practices:

(1) Exclusion of podiatrists from membership in the named provider organizations;

(2) Exclusion of podiatrists from representation in the management of said provider organizations; and,

(3) Reimbursement of podiatrists at only eighty percent of usual and customary rates, in contrast to one hundred percent reimbursement at usual and customary rates for member physicians.

Certainly, these three practices affecting third party providers may not be considered the "business of insurance."

Defendants maintain that the *Hahn* panel's errors are "highlighted" by comparison with the decision of a second panel in the Ninth Circuit, *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir. 1983). An intracircuit dispute is not, of course, sufficient grounds for granting a writ of certioriari. Moreover, there is substantial doubt whether *Klamath-Lake* does conflict with *Hahn*.

In *Klamath-Lake*, Klamath Medical Service Bureau had acquired a pharmacy and provided an option in its group health policies for policyholders to purchase prescription drugs for a small processing fee. An association of pharmacies brought suit, alleging that defendants' pharmacy benefit

amounted to discriminatory pricing, a group boycott, and a product-tying arrangement—all in violation of federal antitrust law. The panel in *Klamath-Lake* held that such a drug reimbursement provision did qualify as the "business of insurance", satisfying one leg of the three-part requirement for an antitrust exemption under the McCarran-Ferguson Act. *Klamath-Lake* at 1286-87.

While comparison of *Klamath-Lake* with *Royal Drug* raises some doubt over the correctness of the *Klamath-Lake* panel's decision, the overwhelming factual distinction between *Hahn* and *Klamath-Lake* is that the defendant in *Klamath-Lake* distributed pharmaceuticals through its own wholly-owned retail outlet. *Id.* at 1286. Otherwise, the agreement would clearly have run afoul of two of the requirements in *Royal Drug* and *Pireno*: that the practice must be (1) an integral part of the policy relationship between the insurer and the insured and (2) limited in its primary impact to entities within the insurance industry. *Royal Drug* at 215, 224; *Pireno* at 3009. O.P.S. and P.A.C.C. are incapable of providing benefits under their policies without involving third-party providers, such as physicians and podiatrists, and reimbursing them for such services. Whereas discriminatory reimbursement practices were not involved in *Klamath-Lake*, that is the essence of plaintiff's claim in *Hahn*. For that reason *Klamath-Lake* is inapposite.

Defendants assert that the district court's analysis in *Hahn* is supported by a number of other federal courts of appeals. Brief analysis of the decisions cited by defendants provides little, if any, support for the district court's analysis. In *Anglin v. Blue Shield of Virginia*, 693 F.2d 315 (4th Cir. 1982), the plaintiff was a health insurance policyholder complaining of a defendant's requirement that he pay premiums to cover his wife, despite her coverage through her job. *Id.* at 316. The Fourth Circuit held that the insurer's refusal to provide a family policy which did not require premiums for the plaintiff's wife was, indeed, the "business of insurance" because such terms of coverage "are the very essence of the relationship between insurer and policyholder." *Id.* at 320.

Two decisions defendants rely upon for support of the district court's decision in *Hahn* are *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308 (D.C. Cir. 1982) and *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981). In both cases, plaintiff automobile repair shops brought suit against defendant automobile insurance companies. They alleged that the refusal of those insurance companies to reimburse for automobile repairs at a rate higher than that determined through defendants' surveys constituted price-fixing. The insurers' contention that their conduct was protected by the McCarran-Ferguson Act was sustained by the courts in both cases. Each court reasoned that *Royal Drug* clearly extended protection to cooperative rate making and joint collection and sharing of statistical data by insurance companies. *Proctor v. State Farm Mutual Automobile Insurance Co.*, at 321; *Quality Auto Body, Inc. v. Allstate Insurance Co.*, at 1201, n.4. In both cases reimbursement at the usual and customary rates was available to any auto body repair shop that agreed to provide such services; that alternative is not available to plaintiff podiatrists in *Hahn*.

The next two decisions cited by defendants in their petition fail to provide support for the position of the district court in *Hahn* because they deal with insurance agents and brokers terminated by their employers. They are inapposite as they address effects on entities who are within the insurance industry, in contrast to the plaintiffs in *Hahn*. *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218, 225 (3d Cir. 1981); *Thompson v. New York Life Insurance Co.*, 644 F.2d 439 (5th Cir. 1981).

Since the Supreme Court's decision in *Royal Drug*, federal courts addressing those activities which constitute the "business of insurance" have moved in the direction of the Ninth Circuit's decision in *Hahn*. Whenever parties outside the insurance industry are those primarily affected by the anticompetitive practices of insurance companies, such practices have been denied the status of the "business of insurance." *See, e.g., St. Bernard Hospital v. Hospital Service*

Association of New Orleans, Inc., 618 F.2d 1140 (5th Cir. 1980) (defendant Hospital Services Association's requirement that for-profit hospitals rebate payments back to defendant when payments by defendant exceed average per diem payment to non-profit hospitals is not the business of insurance, as no risk-spreading is involved); *Portland Retail Druggists Association u. Kaiser Foundation Health Plan*, 662 F.2d 641 (9th Cir. 1981) (defendant Kaiser's drug benefit plan permitting members to obtain pharmaceuticals from Kaiser-operated pharmacies on favorable terms was not the business of insurance where it involved contractual arrangements whereby Kaiser acquired drugs from manufacturers, wholesalers and distributors, parties outside the insurance industry); *Nurse Midwifery Associates u. Hibbett*, 549 F. Supp. 1185 (N.D. Tenn. 1982) (defendant insurance company's conspiracy with obstetricians to deny plaintiff physician medical malpractice insurance to prevent him from associating with nurse midwives in a family-centered maternity practice was not the business of insurance because of its impact on parties outside the insurance industry).

The three-part test for determining when an anticompetitive practice is the "business of insurance" is not altered by inclusion of that practice in the insurance contract. This test was announced in *Royal Drug* despite the fact that the reimbursement differential between member and non-member pharmacies was referred to in the insurance policies. *Royal Drug* at 216, n.14. Similarly, in *Virginia Academy*, the Fourth Circuit's holding that the "bill-through" requirement for reimbursement was not the business of insurance was in no way affected by the fact that it was included in Blue Shield's policy. *Virginia Academy* at 478, 483. Defendants, then, may not rely on the inclusion of their discriminatory reimbursement practices within their contracts of insurance to establish such practices as the "business of insurance."

CONCLUSION

Defendants fail in their petition to present "special and important reasons" for granting the writ. There is no conflict

between the circuits on which interstate activities of a defendant may be relied upon to establish federal jurisdiction under the Sherman Act. Further, defendants are unable even to point to a real controversy within the Ninth Circuit on the appropriate scope of the "business of insurance" requirement for an antitrust exemption under the McCarran-Ferguson Act.

The Ninth Circuit's remand to the district court for (1) identification of a relevant aspect of defendants' interstate commerce and (2) a determination of whether the defendants' interstate activities that are infected by the challenged conduct cause a "not insubstantial effect" on interstate commerce, was entirely in line with the decisions of the United States Supreme Court and the other federal courts of appeals. Further, the Ninth Circuit was correct in determining that defendants' challenged practices have their primary effect on entities outside the insurance industry, including plaintiffs. The fact that these discriminatory practices are mentioned in defendants' insurance contracts does not bring them within the limited ambit of the "business of insurance", as required for an exemption from the federal antitrust laws by the McCarran-Ferguson Act.

For the foregoing reasons, defendants' Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit should be denied.

DATED this 2nd day of June, 1983.

Respectfully submitted,

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